

NORMAN A. BARRON CHIEF MAGISTRATE

STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE B20 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

TELEPHONE (302) 571-2485

LEGAL MEMORANDUM 80-12

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRATE

DATE:

AUGUST 5, 1980

RE:

AUTHORIZING WARRANTS UNDER HUNTER AND DAVIS

A question has been raised concerning the duty of a Justice of the Peace when the police seek warrants for one who allegedly committed the crimes of Assault 1st degree in violation of 11 Del.C. \$613(1)¹ and Possession of a deadly weapon during commission of a felony in violation of 11 Del.C. \$1447. The question was raised in light of the recent case of Hunter v. State, Del.Supr. A.2d, No. 215, 1978 (June 24, 1980). In light of Hunter, supra, the question

^{1&}quot;S612. Assault in the first degree; class B felony.
A person is guilty of assault in the first degree when:

⁽¹⁾ He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument ..."

^{2&}quot;51447. Possession of a deadly weapon during commission of a felony; class B felony.

⁽a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony."

was asked whether the Justice of the Peace should refuse to authorize a warrant charging Possession of a deadly weapon during commission of a felony. I conclude that, assuming the requisite probable cause exists with regard to the charge, the Justice of the Peace should authorize the warrant.

In Hunter, supra, the defendant had been charged with "intentionally causing serious physical injury to Terry Mutler by means of a deadly weapon, to wit: did slash Terry Mutler with a kitchen carving knife, thereby causing serious physical injury." She was also charged with "knowingly [possessing] a deadly weapon, to wit: a kitchen carving knife, during the commission of Assault First Degree as set forth in Count I of this Indictment which is incorporated herein by reference." The Defendant was tried and convicted of both crimes and sentenced consecutively as a result. Our Supreme Court concluded that although the Defendant could be convicted for both offenses, she could not, because of the Double Jeopardy Clause of the Fifth Amendment, 3 be sentenced for both. The Court so held after concluding that the Blockburger 4 test had not been satisfied and that, consequently, multiple punishments for the "same offense" had been imposed. What is the Blockburger test? It holds that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense'", Jeffers v. United States, 432 U.S. 137, 150, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168, 180 (1977), and protection "against multiple punishment for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 665 (1969).

⁴Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 2d 306 (1932).

whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

In <u>Hunter</u>, <u>supra</u>, our Supreme Court found that \$1447 required proof of no fact not required by \$613(1). Under the Assault 1st degree Count, the State proved the charge in that the Defendant intentionally caused serious physical injury to another person by means of a deadly weapon, i.e., a kitchen carving knife. Under the weapons Count, the State proved possession by the Defendant of the identical knife that was the deadly weapon used to commit the Assault 1st degree. But, the Court stated:

"Since the crux of this constitutional proscription lies in the ordeal of multiple trials and multiple punishment for the same offense, (Citation omitted) dual indictments and dual convictions in a single, simultaneous prosecution for an act which amounts to the same offense under separate statutes do not violate the Double Jeopardy Clause. (Citations omitted.) It is only when, as here, multiple punishments are imposed upon such dual convictions under statutes that proscribe the same offense that the spectre of constitutional violations arise."

The Court affirmed both convictions but remanded the case for resentencing, directing that "the State shall have the election to proceed under either \$613 or \$1447, but not both."

Under <u>Hunter</u>, <u>supra</u>, we see that although a Defendant can be charged with, tried and convicted of Assault 1st degree, (intentionally causing serious physical injury to another person by means of a deadly weapon), and Possession of that deadly weapon during the commission of the Assault 1st degree, he cannot be sentenced for both convictions. Since he can be charged with, tried and convicted of both crimes, you should not decline to authorize warrants for

either of the two charges, assuming the existence of probable cause.

While we are on the <u>Hunter</u> problem, it would be worthwhile to touch upon other ramifications of the case. When, for example, would the <u>Blockburger</u> test be satisfied. Let us look at the recent Delaware Supreme Court case of <u>Upshur v. State</u>, Del.Supr., _____A.2d____, No. 169, 1979 (July 21, 1980). There, the Defendant had been charged with Carrying a concealed deadly weapon in violation of 11 <u>Del.C.</u> \$1442⁵ and with Possession of a deadly weapon by person prohibited in violation of 11 <u>Del.C.</u> \$1448.⁶ He was tried and convicted of both offenses and consecutive sentences were imposed thereunder. The Defendant contended that the consecutive sentences for violations of \$1442 and \$1448 subjected him to double punishment for the same offense. Our Supreme Court disagreed:

"Under the <u>Blockburger</u> test, recently embraced by this Court in Hunter v. State,

^{5&}quot;§1442. Carrying a concealed deadly weapon; class E felony.

A person is guilty of carrying concealed a deadly weapon when he carries concealed a deadly weapon upon or about his person without a license to do so as provided by §1441 of this title."

^{6&}quot;S1448. Purchase and possession of deadly weapon by certain persons prohibited; class E felony.

Any person, having been convicted in this State or elsewhere of a felony or a crime of violence involving bodily injury to another, whether or not armed with, or having in his possession any weapon during the commission of such felony or crime of violence, or any person who has ever been committed for a mental disorder to any hospital, mental institution or sanatarium (unless he possesses a certificate of a medical doctor or psychiatrist licensed in this State that he is no longer suffering from a mental disorder which interferes with or handicaps him in the handling of a firearm), or any person who has been convicted for the unlawful use, possession or sale of a narcotic, dangerous drug or central nervous system depressant or stimulant drug as those terms are defined prior to the effective date of the Uniform Controlled Substances Act in January, 1973, or of a narcotic drug or controlled substance as defined in Chapter 47 of Title 16, who purchases, owns, possesses or controls any deadly weapon is guilty of a class E felony."

Del.Supr., A.2d, No. 215, 1978 (June 24, 1980), it is clear that each of the statutes requires proof of an element not required by the other; that is, \$1442 requires proof of concealment and \$1448 requires proof of a prior felony conviction. Thus, these offenses are not the same for jeopardy purposes."

Another related problem concerns a Defendant who is charged with Robbery 1st degree 8 or Attempted Robbery 1st degree where an element of the offense is the displaying of what appears to be a deadly weapon and with Possession of a deadly weapon during commission of a felony.

Our Supreme Court in the cases of <u>Davis v. State</u>, Del.Supr., 400 A.2d 292 (1979) and <u>Bey v. State</u>, Del.Supr. 402 A.2d 362 (1979), after comparing the elements of §832(a)(2) and §1447, concluded as a matter of statutory construction and without having to Feach the constitutional Double Jeopardy Clause issue that with regard to <u>armed</u> robbery, our Legislature intended to replace the weapons statute (§1447), with the special aggravated crime of robbery 1st degree (§832). Our Supreme Court was of the view that since robbery 1st degree carries with it a minimum mandatory sentence of three (3) years which by statute 9 is not subject to probation or parole, a

⁷Defendant had prior felony convictions for Burglary 1st degree, Conspiracy 2nd degree and Possession of stolen property.

⁸The robbery 1st degree statute is found at 11 Del.C. \$832 which states, in part, as follows:

[&]quot;832. Robbery in the first degree.

(a) A person is guilty of robbery in the first degree when he commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

⁽²⁾ Displays what appears to be a deadly weapon ..."

⁹Eleven Del.C. §832(c).

Defendant who is charged with both offenses cannot be <u>convicted</u> of both offenses. The State has the option of trying such a Defendant on one or the other of the charges, but not both. Thus, should the police come before you seeking warrants for both Robbery 1st degree and Possession of a deadly weapon during commission of a felony, you should again authorize both warrants, assuming the existence of probable cause. To do otherwise would, in effect, take the State's option away. There are cases, for example, when the State, under the <u>Davis</u> rationale, might well want to proceed to trial with the weapons charge and <u>nolle</u> pros the underlying offense of Robbery 1st degree.

In conclusion, under either the <u>Davis</u> situation or the <u>Hunter</u> situation, you should authorize warrants for both the weapons charge and the underlying felony, assuming the existence of probable cause. 10

NAB: CW

The Honorable Daniel L. Herrmann cc: The Honorable William Marvel The Honorable Albert J. Stiftel The Honorable Robert H. Wahl The Honorable Robert D. Thompson The Honorable Alfred Fraczkowski The Honorable Richard S. Gebelein The Honorable Lawrence M. Sullivan The Honorable William J. O'Rourke The Honorable Richard McMahon, State Prosecutor Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc. Vance A. Funk, III, Esquire, Chief Alderman Nicholas M. Valiante, Director, NCC Dept. of Public Safety John R. Fisher, Director, Administrative Office of the Courts Law Libraries: New Castle, Kent and Sussex Counties Files

 $^{10 \}text{Without}$ question we have not heard the last on this confusing area of criminal and constitutional law. It will be interesting to see how the law develops in this area.



STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

TELEP-0%E: (302) 571-2485

LEGAL MEMORANDUM 80-12 (ADDENDUM)

TO: ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM: MORMAN A. BARRON

CHIEF MAGISTRATE

DATE: MAY 21, 1981

NORMANIA BAFRON

GHIEF MAG STRATE

RE: AUTHORIZING WARRANTS UNDER HUNTER AND DAVIS

Legal Memorandum 80-12, dated August 5, 1980, discussed the ramifications of the cases of <u>Hunter v. State</u>, Del.Supr., 420 A.2d 119 (1980) and <u>Davis v. State</u>, Del.Supr., 400 A.2d 292 (1979). At footnote 10 in said Legal Memorandum, I stated that, "Without question we have not heard the last on this confusing area of criminal and constitutional law. It will be interesting to see how the law develops in this area."

A new development occurred on May 12, 1981, when the Delaware Supreme Court issued its opinions in the cases of <u>Hunter v. State</u>, Del.Supr., ______ A.2d _____ (1981), and <u>Evans v. State</u>, Del.Supr., ______ A.2d _____ (1981). In these latest decisions, the opinion as expressed in the original <u>Hunter</u> case (420 A.2d 119) was abandoned in Fight of the recent United States Supreme

Court case of Albernaz v. United States, 101 S.Ct. 1137 (March 9, 1981), which set forth the rule as follows:

ments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishment, imposition of such sentences does not violate the Constitution." 101 S.Ct. at 1145.

Note that under the <u>Albernaz</u> rule, the decision of our Supreme Court in the <u>Davis</u> case, <u>supra</u>, still stands. This is so because in <u>Davis</u>, our Supreme Court concluded that with regard to armed robbery, our Legislature intended to replace the weapons statute (11 <u>Del.C.</u>, §1447) with the special aggravated crime of robbery in the first degree (11 <u>Del.C.</u>, §832). Thus, the discussion in Legal Memorandum 80-12 with regard to <u>Davis v. State supra</u>, is still applicable.

Copies of the recent decisions of <u>Hunter</u> and <u>Evans</u> are attached hereto. Please review them and attach same to Legal Memorandum 80-12 as an addendum thereto.

NAB:pn

Enclosures (2)

Cc: The Honorable Daniel L. Herrmann
The Honorable William Marvel
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein

The Honorable Lawrence Sullivan
The Honorable William J. O'Rourke
The Honorable Richard J. McMahon, State Prosecutor
Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
Christine M. Harker, Esquire, Criminal Justice Planning Comm.
John R. Fisher, Director, Administrative Office of the Courts
Law Libraries: New Castle, Kent and Sussex Counties
Files

SARAC. HUNTER, § Defendant Below, § Appellant, § § § No. 215, 1978 § § § STATE OF DELAWARE, ş Plaintiff Below, Appellee.

> Submitted: April 21, 1981 Decided: May 12, 1981

Before HERRMANN, Chief Justice, and DUFFY, McNEILLY, QUILLEN and HORSEY, Justices, constituting the Court en Banc.

Upon remand by the United States Supreme Court. Judgment below affirmed.

Richard E. Fairbanks, Jr. (argued), Richard M. Baumeister, and Edward C. Pankowski, Jr., Assistant Public Defenders, Wilmington, for defendant below - appellant.

Charles M. Oberly, III, Assistant State Prosecutor, and Bartholomew J. Delton, Deputy Attorney General (argued), Wilmington, for plaintiff below - appel

HERRMANN, Chief Justice:

This case, decided by this Court on June 24, 1980 (Hunter v. State, Del. Supr., 420 A.2d 119), is now before this Court on vacating of judgment and remand by the Supreme Court of the United States (in summary disposition of Certiorari 80-283) "for further consideration in light of Albernaz v. United States," 101 S.Ct. 1137 (March 9, 1981). Delaware v. Hunter, 49 U.S.L.W. 3709 (March 23, 1981).

Our reconsideration of <u>Hunter</u>, under the mandate, is limited to the double jeopardy issue to which Albernaz applies.

In <u>Hunter</u>, the defendant was convicted of first-degree assault under 11 <u>Del.C.</u> § 613 (1) and possession of a deadly weapon during the commission of a felony under 11 <u>Del.C.</u> § 1447. Before entering into an examination of whether cumulative punishments for the two offenses under § 613 (1) and § 1447 were constitutionally permissible under the Double Jeopardy Clause of the Fif.

Amendment, "we considered preliminarily the question of whether the General Assembly intended to subject the defendant to multiple penalties for the single criminal act in which she engaged." 420 A. 2d at 124. We there concluded that such was the legislative intent; that "§ 1447 creates an offense distinct from the underlying § 613 (1) felony of Assault First Degree, and that it was the legislative intent to subject this defendant to multiple penalties for the single criminal act in which she engaged"; and that, accordingly, we reached "the constitutional double jeopardy issue and the need to evaluate § 613 (1) and § 1447 in the light of the <u>Blockburger</u> test." 420 A.2d at 124. And then, making the analysis and

Reference is made to the <u>Hunter</u> opinion for the facts and the texts of the Statutes involved. 420 A. 2d at 121-122.

following what we thought were the teachings of Simpson v. United States,
435 U.S. 6, 98 S.Ct. 909, 55 L. Ed. 2d 70 (1978); Brown v. Ohio, 431 U.S.
161, 97 S.Ct. 2221, 53 L. Ed. 2d 187 (1977); Jeffers v. United States, 432 U.S.
137, 97 S.Ct. 2207, 53 L. Ed. 2d 168 (1977); Jannelli v. United States, 420
U.S. 770, 95 S.Ct. 1284, 43 L. Ed. 2d 616 (1975); North Carolina v. Pearce,
395 U.S. 711, 89 S.Ct. 2072, 23 L. Ed. 2d 656 (1969); and Blockburger v.
United States, 284 U.S. 299, 52 S.Ct. 180, 76 L. Ed. 306 (1932), we concluded in Hunter that the Blockburger test was not satisfied; that under the test as applied in the instant case, for "double jeopardy purposes the two offenses are undoubtedly 'the same'"; and that, therefore, multiple punishments for the "same offense" had been imposed here in violation of the Double Jeopardy Clause.
420 A.2d at 125.

This Court unanimously agreed upon that result in the original Hunter opinion.

Subsequent to the filing of the original Hunter opinion on March 14, 1980, the United States Supreme Court decided Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), on April 16, 1980. A motion for reargument and clarification was then pending in the instant case on another issue. In view of the cloud cast by Whalen upon the original Hunter opinion regarding the double jeopardy issue, this Court, sua sponte, requested supplemental briefing regarding the effect of Whalen upon the conclusions we had reached on the double jeopardy issue. Supplemental Opinions were filed in this case upon the Motion for Reargument, on June 24, 1980. 420 A.2d at 127-34.

In the Supplemental Opinions, the majority stated:

"Before reaching the substance of the matter, we are compelled to note that increasing uncertainty exists in this area of the law, resulting from the somewhat ambiguous and to us, at least, puzzling pronouncements in recent United States Supreme Court cases. Compare Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L. Ed. 2d 70 (1978); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L. Ed. 2d 715 (1980); Busic v. , 100 S.Ct. 1747, 64 L.Ed. 2d United States, U.S. 381 (1980). We are not alone in this posture. See e.g., People v. Hughes, 85 Mich. Ct. App. 674, 272 N.W. 2d 567 (1978); Western & Drubel, Toward a General Theory of Double Jeopardy, 1978 SUPREME COURT REV. 81, 113. We thought the Supreme Court cases, and quotations therefrom, cited in the foregoing opinion in this case, constituted settled law on the subject of double jeopardy. But the Court's recent majority decision in Whalen seems to have added a new and, perhaps, contrary analysis structure to cumulative punishment cases without any attempt to clarify, distinguish, or overrule its prior decisions upon the basis of which the foregoing opinion was formulated. It is within this vacuum that we are asked to decide the effect of Whalen on the instant case.

"We distinguish Whalen. That case concluded that Congress had not intended to punish doubly for the crimes of rape and felony murder. Thus, the analysis stopped with the determination that the District of Columbia Court of Appeals had exceeded its legislative authorization in affirming consecutive sentences. On the other hand, our analysis here does not terminate but, in fact, only begins with a determination of the legislative intent behind § 613 and §-1447. We are presented with a question wholly different than that posed in Whalen. There, the concern was the scope of the Double Jeopardy Clause when cumulative punishment for the identical crime is imposed contrary to the intent of the Congress. Here, we are confronted with the question of the scope of the Double Jeopardy Clause when cumulative punishment is meted out for the 'same offense' consistent with the will of the General Assembly. In view of this governing distinction, we cannot apply to this case certain conclusions and statements in the various opinions in Whalen which we find ambiguous, to say the least, when read in the light of previous opinions of the Supreme Court which it has not renounced."

420 A.2d at 128-29 (footnote omitted). And after considerable self-imposed

reconsideration in the light of Whalen, the majority of this Court concluded:

"We are not convinced that Whalen controls the instant case in view of the ambiguities contained therein which we find in unexplained conflict with prior double jeopardy principles which we thought settled. We are unwilling to abandon those principles until the United States Supreme Court has more clearly and definitely abandoned them."

420 A.2d at 130 (footnote omitted).

Justice Quillen dissented in the Supplemental Opinions, joined by Justice McNeilly, stating:

'There is no more confusing area of criminal and constitutional law than the issue of double jeopardy and the related problems of statutory construction. The majority opinion tackles the thicket boldly and I depart from the views it expresses with respect. At the time of the original decision in this case on March 14, 1980, I expressed the view that the result reached by the opinion of the Chief Justice on behalf of the Court '[was] constitutionally mandated under current standards. 'I now find it necessary to withdraw that concurring opinion and to take a most hesitant different view from that of the majority in light of the recent decision of the United States Supreme Court in Whalen v. U.S., 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). I enter the fray hesitantly because, unlike Mr. Justice Rehnquist, I find the double jeopardy opinions of his Court far from clear:

420 A.2d at 132 (footnote omitted) (Quillen, J., dissenting). The dissent concluded:

"As I read Whalen, the Court has taken a turn, not ninety degrees, but decipherable. There has been a recognition that recent opinions have been '[demanding] more of the Double Jeopardy Clause than it is capable of supplying.' Western & Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review, 81, 113. Furthermore, as I see it, there is implicit in the Whalen majority some support for the proposition that cumulative punishments may be imposed in a single trial if Congress defined the offenses separately and authorized cumulative punishments. See also Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 153 L. Ed. 2d 187 (1977). Based on this reading, which I hope rises above blind speculation to at least educated surmise, I conclude the concept of double jeopardy as embodied in the Fourteenth Amendment of the United States Constitution does not proscribe the consecutive punishments which were imposed in this case."

420 A.2d at 134 (footnote omitted) (Quillen, J., dissenting).

Thus the issue stood in this State (subject to a stay by this Court on all affected cases pending the outcome of the State's petition for certiorari) until the United States Supreme Court acted upon that petition by vacating this Court's judgment in this case and remanding the cause for reconsideration in the light of Albernaz, decided March 9, 1981.

* * *

We now have the enlightenment of the opinion of the Court in Albernaz, as set forth in its final paragraphs:

"Having found that Congress intended to permit the imposition of consecutive sentences for violations of § 846 and § 963, we are brought to petitioners' argument that notwithstanding this fact, the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution precludes the imposition of such punishment. While the Clause itself simply states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb, the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator. We have previously stated that the Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the offense after conviction. And it protects against multiple punishments for the same offense.' North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed. 2d 656 (1969) (footnotes omitted).

"Last Term in Whalen v. United States, supra, this Court stated that 'the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishment the Legislative Branch has authorized.' 445 U.S., at 688, 100 S.Ct., at 1436; id., at 696, 100 S.Ct., at 1440 (WHITE, J., concurring in part and concurring in the judgment); id., at 696, 100 S.Ct., at 1440 (BLACKMUN, J., concurring in the judgment). In determining the permissibility of the imposition of cumulative punishment for the crime of rape and the crime of unintentional

'dispositive question' was whether Congress intended to authorize separate punishments for the two crimes. Id., at 689, 100 S.Ct., at 1436. This is so because the 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' Ibid. As we previously noted in Brown v. Ohio, supra, 'where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.' 432 U.S., at 165, 97 S.Ct., at 2225. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.3"

101 S.Ct. at 1144-45.

The enlightenment of the Court's opinion in Albernaz is significantly dimmed, however, and the "veritable Sargasso Sea" of the decisional law in

Detritioners' contention that a single conspiracy which violates both § 846 and § 963 constitute the 'same offense' for double jeopardy purposes is wrong. We noted in Brown v. Ohio, supra, that the established test for determining whether two offenses are the 'same offense' is the rule set forth in Blockburger — the same rule on which we relied in determining congressional intent. As has been previously discussed, conspiracy to import marihuana in violation of § 963 and conspiracy to distribute marihuana in violation of § 846 clearly meet the Blockburger standard. It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause. See, e.g., Harris v. United States, 359 U.S. 19, 79 S.Ct. 560, 3 L. Ed. 2d 597 (1959); Gore v. United States, supra. This is true even though the 'single transaction' is an agreement or conspiracy. American Tobacco Co. v. United States, supra."

The Sargasso Sea is a large oval-shaped area of the North Atlantic Ocean set apart by the presence of marine plants, or seaweed, which float on its surface — a region of slow ocean currents surrounded by a boundary of rapidly moving currents such as the Gulf Stream and the North Equatorial Current. "The early navigators who sailed their small ships to North

the area remains significantly entangling to the "judicial navigator", by reason of two factors:

- (1) The definitive ultimate and penultimate sentences of Albernaz are dicta, unnecessary to reach the Court's conclusion in that case; and
- (2) Mr. Justice Stewart, the author of <u>Whalen</u>, in a concurring opinion joined by Justices Marshall and Stevens, felt impelled to disavow that <u>dicta</u>, stating:

"In Whalen v. United States, the Court said that 'the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.' 445 U.S. at 688, 100 S.Ct., at 1436.

'But that is a far cry from what the Court says today:
'... [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.' Ante, at 1145. These statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion.

"No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

"Since Congress has created two offenses here, and since each requires proof of a fact that the other does not, I concur in the judgment." (Emphasis supplied).

101 S.Ct. at 1145-46 (Stewart, J., concurring).

(continued)

America saw the Sargasso Sea as patches of gulfweed that seemed to form wide-spreading meadows. Soon there were legends and myths about the region which told of large islands of thickly matted seaweed inhabited by

The cloud thus remaining over the law of double jeopardy notwithstanding, we must consider ourselves bound by the majority rule now apparently emerging out of the "Sargasso Sea" and manifesting itself in the last paragraphs of Albernaz. Although dicta, the emergence of the evolving rule stands unmistakably clear by virtue of the vote of 6 to 3, cast in the face of the flat contradiction of the concurring Justices, including the author of Whalen.

Applying the rule of <u>Albernaz</u> to the instant case, we now hold that where the General Assembly intended, as we have found that it did in § 613 (1) and § 1447, to impose multiple punishments for two offenses not satisfying the <u>Blockburger</u> test, imposition of two consecutive sentences by a court as a result of a single criminal trial does not violate the Double Jeopardy Clause of the Fifth Amendment.

The Hunter majority in this Court reluctantly follows the evolving rule of the majority of the United States Supreme Court in Albernaz. The Rule of Supremacy prevails on this issue, however, and trusting, as we must, that the dicta in Albernaz will soon become the clear and unquestioned rule of law to be followed, we now hold as follows in the instant case: Our conclusion "that § 1447 creates an offense distinct from the underlying § 613 (1) felony of Assault

^{§ 1447 (}c), especially, makes such intent unmistakable:
"§ 1447. Possession of a deadly weapon during commission of a felony; class B felony."

[&]quot;(c) Any sentence imposed upon conviction for possession of a deadly weapon during the commission of a felony shall not run concurrently with any other sentence. In any instance where a person is convicted of a felony, together with a conviction for the possession of a deadly weapon during the commission of such felony, such person shall serve the sentence for the felony itself before beginning the sentence imposed for possession of a deadly weapon during such felony. * * *"

First Degree, and that it was the legislative intent to subject this defendant to multiple penalties for the single criminal act in which she engaged, "420 A. 2d at 124, is determinative upon the issue of double jeopardy. It follows therefrom that the imposition of multiple sentences upon the defendant for the two offenses in this case does not violate the Double Jeopardy Clause of the Fifth Amendment.

Any statement contrary to the above, contained in the previous <u>Hunter</u> opinions of this Court, is hereby abandoned.

The judgment below now stands AFFIRMED.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

§ WALTER EVANS, δ Defendant Below, Appellant, § § § No. 174, 1978 v. § § § STATE OF DELAWARE, Plaintiff Below, Appellee.

> Submitted: April 21, 1981 Decided: May 12, 1981

Before HERRMANN, Chief Justice, and DUFFY, McNEILLY, QUILLEN and HORSEY, Justices, constituting the Court en Banc.

Upon remand by the United States Supreme Court. Judgment below affirmed.

Michael Weiss (argued), of Kimmel & Spiller, P.A., Wilmington, for defendant below - appellant.

Charles M. Oberly, III, Assistant State Prosecutor, and Bartholomew J. Dalton, Deputy Attorney General (argued), Wilmington, for plaintiff below - appellee.

HERRMANN, Chief Justice:

This case is again before this Court after the prior judgment was vacated and the case remanded by the United States Supreme Court for "further consideration in light of Albernaz v. United States," 101 S.Ct. 1137 (March 9, 1981). Delaware v. Evans, 49 U.S.L.W. 3709 (March 23, 1981). The prior opinion of this Court in this case appears at 420 A.2d 1186 (1980). As will be seen there, Hunter v. State, Del.Supr., 420 A.2d 119 (1980) was considered controlling.

Today, the <u>Hunter</u> rules upon the issue of double jeopardy have been found by this Court to be in conflict with the recent pronouncements of the United States Supreme Court in <u>Albernaz</u>. See <u>Hunter v. State</u>, Del.Supr., A.2d , (May 12,1981).

The rule of Albernaz has been stated as follows:

"* * * [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution."

101 S.Ct. at 1145 (footnote omitted).

In <u>Hunter</u>, as in the instant case, it was determined by this Court that the General Assembly intended to subject the defendant to multiple punishments for violation of 11 <u>Del.C.</u> § 1447 (possession of a deadly weapon during the commission of a felony) and for the underlying felony or felonies. Following <u>Albernaz</u>, we concluded in <u>Hunter</u> that the legislative intent was determinative upon the issue of double jeopardy; that it follows therefrom that the imposition of two consecutive sentences upon the defendant as the result of a single trial.

for the two offenses, not satisfying the <u>Blockburger</u> test, does not violate the Double Jeopardy Clause of the Fifth Amendment.

Accordingly, any statement contained in the previous opinion of this Court in the instant case, contrary to today's opinion in <u>Hunter</u>, is hereby abandoned.

The judgment below now stands AFFIRMED.



STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE

NORMAN A BARRON CHIEF MAGISTRATE 820 NORTH FRENCH STREET 11TH FLOOP WILMINGTON DELAWARE 19801

TELEPHONE. (302) 571-2485

LEGAL MEMORANDUM 80-12 (SECOND SUPPLEMENT)

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRATETICAL

DATE:

OCTOBER 16, 1985

RE:

AUTHORIZING WARRANTS UNDER HUNTER AND DAVIS

In Legal Memorandum 80-12 (Addendum), dated May 21, 1981, I discussed the confusion over the Double Jeopardy Clause as it applied to sentencing and the United States Supreme Court case of Albernaz v. United States, 101 S.Ct. 1137 (March 9, 1981), which cleared up most of the confusion.

I noted, however, that the <u>Albernaz</u> decision did not upset the Delaware Supreme Court decision in <u>Davis v. State</u>, Del.Supr., 400 A.2d 292 (1979), a case which dealt with a charge of Robbery 1st degree and a charge of Possession of a deadly weapon during the commission of a felony. Or, so I thought. In <u>Thomas v. State</u>, Del.Supr., 467 A.2d 954, 959 (1983), the Supreme Court of Delaware proved me wrong when it stated as follows:

"Defendants' final contention is that the Trial Judge erred as a matter of law in separately sentencing them on the three counts of Robbery First Degree, Possession of a Deadly Weapon and Assault First Degree arising from the loan office robbery.

Defendants contend that Possession of a Weapon during Commission of a Felony, ll Del.C., §1447, and the underlying felony of Robbery in the First Degree, ll Del.C., §832, are always the 'same' offense for sentencing purposes and that imposition of separate sentences violated the Double Jeopardy Clause of the Fifth Amendment.

Such sentencing is proper under Albernaz United States, 450 U.S. 333, 101 S.Ct. 1138, 67 L.Ed.2d 275 (1981) and the decisions of this Court effectuating the United States Supreme Court's Hunter v. State, Del.Supr., 430 A.2d 476 ruling. Evans v. State, Del.Supr., 430 A.2d 481 (1981):Where the General Assembly intended . . (1981).to impose multiple punishments for two offenses not satisfying the Blockburger test, imposition of two consecutive sentences by a court as a result of a single criminal trial does not violate the Double Jeopardy Clause of the Fifth Amendment. Hunter, 430 A.2d at 481.'

This position was reaffirmed in <u>Kelly v. State</u>, Del.Supr., No. 23, 1984 (Order dated July 9, 1985) where the Court opined as follows:

"Finally, defendant contends that, under Davis v. State, Del.Supr., 400 A.2d 292 (1979), he cannot be sentenced for both first degree robbery and possession of a deadly weapon, as conviction for possession of a deadly weapon during the commission of a felony cannot stand where the defendant has been convicted of first degree robbery. However, under Albernaz v. United States, 450 U.S. 333 (1981), where the legislature has intended to impose multiple punishments for two offenses which are not the same offenses under Blockburger v. United States, 284 U.S. 299 (1932), the imposition of multiple sentences for the two offenses does not violate the Double Jeopardy Clause of the Fifth Amendment. See Hunter Del.Supr., 430 A.2d 476 (1981). State, conclude that it was the legislative intent to subject the defendant to multiple penalties for his unlawful act, and therefore rule that imposition of the multiple sentences was proper."

Thereafter, the defendant, Kelly, requested a rehearing on the issue before the full Supreme Court. By Order dated July 30, 1985, the Court, sitting En Banc, denied the request:

"This 30th day of July, 1985, the Court having considered the motion of the defendant Edward J. Kelly for rehearing En Banc, and it appearing that the issues raised by the appellant are controlled by well settled principles of law under Blockburger v. United States, 284 U.S. 299, 303-04 (1932); Hunter v. State, Del.Supr., 430 A.2d 476, 481 (1981) and Thomas v. State, Del.Supr., 467 A.2d 954, 959 (1983).

NOW, THEREFORE, IT IS ORDERED that the Motion for Rehearing En Banc be, and the same hereby is,

DENIED."

What is now apparent is that the defendant may be charged with two separate crimes found within the Criminal Code and, upon conviction, be sentenced with regard to each, so long as one is not a lesser-included offense of the other. This is so because the General Assembly has so intended, and its intent overrides the test as enunciated in <u>Blockburger v. United States</u>, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

NAB:pn

The Honorable Andrew D. Christie cc: The Honorable William T. Allen The Honorable Albert J. Stiftel The Honorable Robert H. Wahl The Honorable Robert D. Thompson The Honorable Alfred R. Fraczkowski The Honorable Charles M. Oberly, III Lawrence M. Sullivan, Esquire Eugene M. Hall, Esquire Charles S. Crompton, Jr., Esq., Pres., Delaware Bar Assoc. Professor William J. Conner, Delaware Law School Michael E. McLaughlin, JP Court Administrator John R. Fisher, Dir., Administrative Office of the Courts Law Libraries: New Castle, Kent, and Sussex Counties Files